A

MAXIS COMMUNICATIONS BHD

v.

DIRECTOR GENERAL OF INLAND REVENUE & ANOR

B

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN CJ (MALAYA)
HASAN LAH FCJ
ZALEHA ZAHARI FCJ
C ZAINUN ALI FCJ
ABU SAMAH NORDIN FCJ
[CIVIL APPEAL NO: 01(f)-42-09-2013(W)]
20 NOVEMBER 2014

D ***REVENUE LAW:*** *Income tax - Payment of tax - Employees' share option scheme - Share option agreement - Whether a binding contract existed - Conditional takeover of company - Effect of - Payment of equivalent cash consideration - Whether an employment income and a perquisite under s. 13(1)(a) Income Tax Act 1967 ('ITA') - Taxation* E *of employment income - Whether employee had right to purchase shares before anniversary date - Whether shares vested in employee - Whether cash benefits received taxable under s. 25(1) ITA - Whether tax payable assessed pursuant to ss. 25(1A) and 32(1A) ITA*

F The appellant ('Maxis') launched an Employees Share Option Scheme ('ESOS') when it was listed on Bursa Malaysia. Eligible employees were granted options to subscribe for shares in Maxis *vide* the ESOS. If the eligible employee accepted the offer, he/she would then sign the share option agreement. The signed G acceptance form specified, *inter alia*, the price per share, the total amount payable and payment of RM1 which would result in a binding contract. However, before the option could be exercised, Maxis had been subjected to a conditional takeover by Binariang GSM Sdn Bhd and it acquired all voting shares in Maxis for a cash consideration. Due to the said takeover, the holders of the H unvested option were entitled to a payment of equivalent cash consideration ('ECC'). Under the ECC, the employees received an alternative consideration in substitution or in cancellation of all outstanding unvested options. Issues arose as to how the said I employees were to be assessed for tax. The respondents ('Revenue') took the position that the payment of ECC to Maxis'

employees as perquisite arose from an employment income under s. 13(1)(a) of the Income Tax Act 1967 ('Act') and was not a share based income which would be taxable under ss. 25(1A) and 32(1A) of the Act. On filing a suit in relation to this matter, the High Court decided in favour of Maxis that the ECC was taxable under s. 13(1)(a) of the Act but the value of tax payable was to be assessed pursuant to ss. 25(1A) and 32(1A). The court found, *inter alia*, that (i) a legally binding contract was created where eligible employees were granted a contractual right to shares in Maxis regardless of whether the options were vested; (ii) the offer became a contract when it was accepted by the eligible employees and a consideration of RM1 was given; and (iii) s. 25(1A) applied to gross income for employees who received payment under the ECC. Following *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd*, the Court of Appeal set aside the order of the High Court and affirmed the Revenue's ruling. Hence, this appeal. The issue that arose for consideration was in relation to the payment of the ECC to the Maxis employees and the basis for taxation of an employment income. Maxis argued, *inter alia*, that (a) it was irrelevant as to whether the options under the share option agreement had yet to be vested since ss. 25(1A) and 32(1A) did not differentiate between vested and unvested options; and (b) an eligible employee had a valid and enforceable contractual right under the scheme despite the fact that his option only vested on an annual basis over a three year period.

Held (dismissing appeal with costs)
Per Zulkefli Makinudin CJ (Malaya) delivering the judgment of the court:

(1) Being a cash payment, the ECC was an employment income and constitutes a perquisite under s. 13(1)(a) of the Act. Based on *Black's Law Dictionary*, the word "perquisite" means "a privilege or benefit given in addition to one's salary or regular wages". The basis for taxation of an employment income is provided under s. 25(1) of the Act in which the employment income is taxed in the year an employee received such income. However, by virtue of s. 25(1A) of the Act, the perquisite is taxed in the year the employee exercised the right to purchase the shares. On the facts, ss. 25(1A) and 32(1A) of the Act were not applicable to determine the taxability of the payment of the ECC. (paras 16-20)

(2) Upon a plain reading of s. 25(1A) of the Act, the following elements must be in existence, *ie*, (i) a right to acquire shares; (ii) the shares must be owned by the employee/under his name; and (iii) if the right to acquire the shares exist, the date as to when that right is exercised or released. On the facts, the employees of Maxis were offered the right to purchase the shares on the vested date. However, before the option was exercised, Maxis had been subjected to a takeover. Thus, there were no shares to be offered to the employee. Besides, the date of the grant was not the date where the employees had acquired the right over the shares. The option was only vested on the employees, one third of each anniversary and the employee must exercise the right on or after the anniversary date. (paras 22 & 23)

(3) There was no ambiguity with regards to the interpretation of the words in ss. 25(1A) and 32(1A) of the Act. In its ordinary meaning, they were applicable to employment income (perquisite) in respect of any right to acquire shares and provide the mechanism to compute the value of shares/ perquisite. On the facts, the provisions applied to shares and not to cash payment or the ECC. (paras 25 & 26)

(4) The payment of the ECC was not based on ESOS. The RM1 payment made by the employee indicated the employee's acceptance of the offer. It did not give the employee the right to acquire the shares as yet. The employees were only eligible to purchase the shares on the anniversary date in order to be the rightful owner of the shares. However, the employee could not maintain the offer to purchase the shares due to the takeover since Maxis had been delisted. As such, there were no longer any shares to be offered. The employee did not have any right to purchase the shares before the anniversary date as the shares had yet to be vested in the employee. Thus, the cash benefit received was taxable under s. 25(1) of the Act. (paras 24 & 28)

Bahasa Malaysia *Translation Of Headnotes*

Perayu ('Maxis') telah melancarkan satu Skim Opsyen Saham Pekerja ('ESOS') semasa disenaraikan di Bursa Malaysia. Pekerja-pekerja yang berkelayakan diberi opsyen untuk melanggan saham Maxis melalui ESOS. Jika pekerja itu menerima tawaran tersebut, dia akan menandatangani perjanjian opsyen saham. Borang persetujuan yang telah ditandatangani menyatakan, antara lain,

harga saham, jumlah yang perlu dibayar dan bayaran RM1 yang akan mewujudkan kontrak yang mengikat. Walau bagaimanapun, sebelum opsyen itu boleh dilaksanakan, Maxis telah diambilalih dengan syarat oleh Binariang GSM Sdn Bhd dan telah memperoleh semua saham mengundi di Maxis dengan balasan tunai. Disebabkan pengambilalihan tersebut, pemegang opsyen yang tidak diletakhak itu layak untuk satu bayaran pertimbangan tunai setara ('ECC'). Di bawah ECC, pekerja telah menerima balasan alternatif sebagai gantian atau atas pembatalan opsyen yang tidak diletakhak itu. Isu berbangkit berkenaan penilaian cukai untuk pekerja-pekerja itu. Responden-responden ('Lembaga Hasil') mengambil pendirian bahawa bayaran ECC kepada pekerja Maxis sebagai perkuisit berbangkit daripada pendapatan pekerjaan di bawah s. 13(1)(a) Akta Cukai Pendapatan 1967 ('Akta') dan bukanlah saham berdasarkan pendapatan yang boleh dikenakan cukai di bawah ss. 25(1A) dan 32(1A) Akta. Berdasarkan guaman yang difailkan terhadap perkara ini, Mahkamah Tinggi telah memutuskan bagi pihak Maxis bahawa ECC boleh dikenakan cukai di bawah s. 13(1)(a) Akta tetapi nilai cukai yang perlu dibayar adalah berdasarkan peruntukan ss. 25(1A) dan 32(1A). Mahkamah mendapati, antara lain, bahawa (i) satu kontrak yang mengikat secara sah telah diwujudkan di mana pekerja-pekerja yang layak telah diberi hak kontrak kepada saham Maxis tanpa menghiraukan sama ada opsyen itu diletakhak; (ii) tawaran itu telah menjadi kontrak apabila diterima oleh pekerja-pekerja yang layak dan balasan RM1 telah diberi; dan (iii) s. 25(1A) terpakai kepada pendapatan kasar pekerja yang menerima bayaran di bawah ECC. Mengikut *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd*, Mahkamah Rayuan telah mengenepikan perintah Mahkamah Tinggi dan mengesahkan keputusan Lembaga Hasil. Oleh itu, rayuan ini. Isu yang dibangkitkan untuk pertimbangan adalah berkenaan bayaran ECC kepada pekerja Maxis dan asas percukaian bagi pendapatan pekerjaan. Maxis berhujah, antara lain, bahawa (a) adalah tidak relevan sama ada opsyen di bawah perjanjian opsyen saham telah diletakhak memandangkan ss. 25(1A) dan 32(1A) tidak membezakan di antara opsyen yang diletakhak dan tidak diletakhak; dan (b) seorang pekerja yang berkelayakan mempunyai hak kontrak sah di bawah skim itu walaupun opsyennya hanya diletakhak setiap tahun dalam tempoh tiga tahun.

Diputuskan (menolak rayuan dengan kos)
Oleh Zulkefli Makinudin HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Sebagai bayaran tunai, ECC merupakan pendapatan pekerjaan dan suatu perkuisit di bawah s. 13(1)(a) Akta. Berdasarkan *Black's Law Dictionary*, perkataan "perquisite" bermaksud "a privilege or benefit given in addition to one's salary or regular wages". Asas percukaian pendapatan penggajian diperuntukkan di bawah s. 25(1) Akta di mana pendapatan penggajian dicukai pada tahun pekerja menerima pendapatan tersebut. Walau bagaimanapun, menurut s. 25(1A) Akta, perkuisit dicukai pada tahun pekerja itu melaksanakan haknya untuk membeli saham. Berdasarkan fakta, ss. 25(1A) dan 32(1A) Akta tidak terpakai untuk menentukan pengenaan cukai bagi bayaran ECC.

(2) Berdasarkan bacaan jelas s. 25(1A) Akta, unsur-unsur berikut mestilah wujud, iaitu (i) hak untuk memperoleh saham; (ii) saham dimiliki oleh pekerja/di bawah namanya; dan (iii) jika hak untuk memperoleh saham itu wujud, bilakah tarikh hak itu dilaksanakan. Berdasarkan fakta, pekerja Maxis telah ditawarkan dengan hak untuk membeli saham pada tarikh peletakhakkan. Walau bagaimanapun, sebelum opsyen itu dilaksanakan, Maxis telah diambilalih. Oleh itu, tiada saham untuk ditawarkan kepada pekerja itu. Di samping itu, tarikh geran bukanlah tarikh di mana pekerja telah memperoleh hak atas saham itu. Opsyen itu diletakhak atas pekerja, satu pertiga setiap ulang tahun dan pekerja perlu melaksanakan hak pada atau selepas tarikh ulang tahun itu.

(3) Tiada ketaksaan terhadap tafsiran perkataan di dalam ss. 25(1A) dan 32(1A) Akta. Dalam erti kata biasa, ia adalah terpakai kepada pendapatan pekerjaan (perkuisit) bagi sebarang hak yang diperolehi dan memberi mekanisma untuk mengira nilai saham/perkuisit. Berdasarkan fakta, peruntukan tersebut terpakai kepada saham dan bukan kepada bayaran tunai atau ECC.

(4) Bayaran ECC adalah tidak berdasarkan ESOS. Bayaran RM1 yang dibuat oleh pekerja menunjukkan tawaran itu diterima olehnya. Pekerja masih tidak diberi hak untuk memperoleh saham. Pekerja hanya layak untuk membeli saham pada tarikh ulang tahun untuk menjadi pemilik saham yang sah. Walau

bagaimanapun, pekerja tidak dapat mengekalkan tawaran untuk membeli saham atas alasan pengambilalihan memandangkan Maxis tidak disenaraikan lagi. Oleh itu, tidak ada saham untuk ditawarkan. Pekerja tidak mempunyai hak untuk membeli saham sebelum tarikh ulang tahun memandangkan saham masih belum diletakhak kepada pekerja itu. Oleh itu, faedah tunai yang diterima boleh dikenakan cukai di bawah s. 25(1) Akta.

Case(s) referred to:
Abbott v. Philbin [1961] AC 352 ***(refd)***
Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd [2014] 3 CLJ 421 FC ***(refd)***
Wilcock (Inspector of Taxes) v. Eve [1995] STC 18 ***(refd)***
Williamson (Inspector of Taxes) v. Dalton [1981] STC 753 ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 2, 13(1)(a), 25(1A), 32(1A)

For the appellant - Rishwant Singh (Gandhi Mohan Maniam with him); M/s Zul Rafique & Partners
For the respondents - Hazlina Hussain (Ahmad Khairuddin & Muhammad Farid with her); FCs

Reported by Kumitha Abd Majid

JUDGMENT

Zulkefli Makinudin CJ (Malaya):

Introduction

[1] This is an appeal by the appellant, Maxis Communications Berhad against the whole decision of the Court of Appeal in allowing the respondents' appeal against the decision of the High Court. The Court of Appeal set aside the order of the High Court and affirmed the ruling made by the respondents dated 10 October 2008 in relation to tax liable to be paid by the employees of the appellant on payment received under the appellant's employee share option scheme. We shall hereinafter refer to the appellant as Maxis and to the respondents as the Revenue.

Leave To Appeal

[2] Leave to appeal was granted by this court on the following questions of law:

A (i) Where an employee's participation in an Employees Share Option Scheme ("ESOS") results in that employee's tax liability arising under s. 13(1)(a) of Income Tax Act 1967 ("the Act") with the taxable value being determined under ss. 25(1A) and 32(1A) of the Act:

B (a) Does the RM1 paid by the employee to the employer constitute a valid and sufficient consideration so as to create a binding contract between the employee and the employer?

C (b) If the employer subsequently cannot honour the employee's exercise of that option (due to circumstances beyond that employer's control eg, the employer is the subject of a takeover and thereafter becomes a private limited company), can the employee maintain that his D contractual right to acquire shares under the ESOS has been breached?

(c) Where an employee is eligible to participate in the ESOS but his option is at that point in time unvested (ie, it will E be exercisable only after a particular date), does that employee have a valid and enforceable contractual right under the ESOS?

(ii) From the point of view of taxation value under ss. 13(1)(a) F read with 25(1A) and 32(1A) of the Act does an employee who holds vested option in the ESOS differ from an employee who holds unvested options in the ESOS?

(iii) Whether a payment (ie, ECC payment) received by an employee (who holds unvested options) from his employer (in G return for the employee giving up his contractual rights in the unvested options) is liable to be taxed.

(a) Under s. 13(1)(a) of the Act to the exclusion of ss. 25(1A) and 32(1A) of the Act for the receipt of such payment?; H or

(b) Under s. 13(1)(a) of the Act with the value of tax being determined under ss. 25(1A) and 32(1A) of the Act?

I

Background Facts

[3] The relevant background facts of the case are these. Maxis launched ESOS when it was listed on Bursa Malaysia. By this ESOS eligible employees were granted options to subscribe for shares in Maxis through ESOS. The options were granted by way of a letter of offer from Maxis to an eligible employee. Upon receipt of the letter of offer, an eligible employee would decide whether to accept the offer or not. If the eligible employee accepted the offer, he or she would sign an acceptance form referred to as the "share option agreement".

[4] The signed acceptance form specified the number of shares accepted, the price per share, the total amount payable and payment of RM1 resulting in a binding contract. The options vest one-third (1/3) on each anniversary (over a three-year period) from the date of the offer. An eligible employee can exercise the option up to ten (10) years from the date of the first grant.

[5] On 3 May 2007 Binariang GSM Sdn Bhd ("Binariang") served a notice of conditional take-over on the board of directors of Maxis. On 24 May 2007 Binariang made a conditional take-over to acquire all voting shares in Maxis for a cash consideration. By reason of the take-over and the request of Binariang the board of directors of Maxis invoked cl. 10 of the ESOS bylaws where the holders of the unvested option were entitled to a payment of equivalent cash consideration (ECC) in accordance with the vesting schedule of such unvested option. Under the ECC, the employees receive an alternative consideration in substitution or in cancellation of all outstanding unvested options. The cash amount would only be paid to them in tranches according to the original vesting schedule applicable to the outstanding options.

[6] The issue to be decided in this case involves the question of how eligible employees were to be assessed for tax for a cancellation of all outstanding unvested option in return for the payment of the ECC. The Revenue in a ruling dated 10 October 2008 took the position that the payment of ECC to Maxis' employees as perquisite arising from employment under s. 13(1)(a) of the Act and not as share based income as contended by Maxis which would be taxable under ss. 25(1A) and 32(1A) of the Act.

A

Findings Of The High Court

[7] The High Court decided in favour of Maxis and ruled that the ECC was taxable under s. 13(1)(a) of the Act but the value of tax payable was to be assessed pursuant to ss. 25(1A) and
B 32(1A) of the Act. The High Court in its decision amongst others made the following findings:

(i) Under cl. 6 of the Maxis bylaws, each grant under the ESOS plan was made by a formal offer by Maxis which was accepted by eligible employees and supported by binding
C consideration of RM1;

(ii) A legally binding contract was created where eligible employees were granted a contractual right to shares in Maxis regardless of whether the options were vested or not;

D

(iii) The offer became a contract when it was accepted by the eligible employees and consideration of RM1 was given;

(iv) The fact that the options would only vest based on the vesting schedule was in fact immaterial. Section 25(1A) of the
E Act does not require that the options must vest before it applies;

(v) The grant of the option gave rise to a right to acquire shares at the point of grant;

F

(vi) The right to acquire shares in the instant case was released when the respective employees surrendered their rights for cancellation in return for payment of the ECC; and

(vii) Section 25(1A) of the Act applied to gross income for
G employees who received payment under ECC and the treatment to tax fell under s. 32(1A) of the Act.

Findings Of The Court Of Appeal

H **[8]** The Court of Appeal allowed the appeal by the Revenue against the decision of the High Court. The order of the High Court was set aside and the ruling by the Revenue dated 10 October 2008 was affirmed.

I

[9] The Court of Appeal in its judgment *inter alia* made the following findings:

> Following *Palm Oil Research and Development Board Malaysia & Anor. v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265 as to interpretation of a taxing statute, and looking fairly at the language used, it is true there was a binding contractual obligation giving the employees a right to acquire shares under the terms of the scheme, but the actual entitlements remained to be determined, eg, the passage of time the employee remained in employment. There was no right to specific shares yet. They remained unvested. The ECC was dealing with these unvested shares. We conclude that the application of ss. 25(1A) and 32(1A) does not arise.

Submissions Of The Appellant (Maxis)

[10] Learned counsel for Maxis submitted that the High Court had correctly held that the fact that the options under the share option agreement had not yet vested was not relevant. Sections 25(1A) and 32(1A) of the Act do not differentiate between vested options and unvested options. An eligible employee therefore has a valid and enforceable contractual right under the scheme despite the fact that his option only vests on an annual basis over a three (3) year period.

[11] It was contended for Maxis the fact is that all eligible employees gave good and valid consideration for the contract and in return for that consideration, the employee acquired the right to participate in the scheme. The takeover by Binariang did not absolve Maxis from complying with its contractual obligations with the eligible employees. Maxis therefore resorted to bylaw 10.1 of the bylaws of the ESOS and paid an equivalent consideration, that is, the ECC to absolve itself from its obligation under the ESOS.

[12] It was submitted for Maxis in an ESOS, the taxable benefit to the recipient is the right to acquire shares in a company. This is clear from the provisions of s. 13(1)(a) of the Act read with s. 25(1A) and s. 32(1A) of the Act. Learned counsel for Maxis further impressed upon us that such a treatment is also in accordance with the English position that a taxable benefit arises when a right to acquire shares is granted to the employee. (See *Abbott v. Philbin* [1961] AC 352 and *Williamson (Inspector of Taxes) v. Dalton* [1981] STC 753).

[13] It was further submitted for Maxis that until 2006 which was the year when s. 25(1A) and section 32(1A) were introduced the Act did not contain specific provisions for the taxation of share-based income. Instead, reliance was placed largely on principles of taxation established in English case law and the Inland Revenue Board's Public Ruling No. 4/2004.

[14] On the ECC payment it was submitted for Maxis an employee would receive payment in "cancellation" of all outstanding and unvested options that the employee would otherwise be contractually entitled to. In effect, therefore, the employee surrenders the right to unvested options in return for consideration, namely, the payment of ECC.

[15] It is the contention of Maxis the applicable principle of law is that a payment made to an employee to compensate him for the lapse of or the removal of his share option rights is not a benefit provided to the employee by reason of the employee's employment. (See the case of *Wilcock (Inspector of Taxes) v. Eve* [1995] STC 18). It is Maxis' case that the ECC payment does not constitute additional cash remuneration of Maxis employees and the ECC payment therefore need not be reflected in Maxis' employees income statement for the year in which the ECC payment is paid to Maxis' employees.

Decision

[16] The issue under appeal is on the payment of the ECC to the Maxis employees and the basis for taxation of an employment income. It is not disputed that the ECC being a cash payment is an employment income under s. 13(1)(a) of the Act. Section 13(1)(a) of the Act provides as follows:

> 13. (1) Gross income of an employee in respect of gains or profits from an employment includes:
>
> (a) Any wages, salary, remuneration, leave pay, fee, commission, bonus, gratuity, perquisite or allowance (whether in money or otherwise) in respect of having or exercising the employment.

[17] We are of the view the ECC constitutes a perquisite under s. 13(1)(a) of the Act. The question to be decided is on the mechanism to tax such income. The basis for taxation of an

employment income is provided for under s. 25(1) of the Act in which the employment income is taxed in the year an employee received such income. Section 25(1) of the Act provides as follows:

> **25. Basis period to which gross income from an employment is related**
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> (1) Subject to sub-ss (1A), or (2A) where gross income from an employment:
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> (a) Is not receivable in respect of any particular period; and
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> (b) First becomes receivable in the relevant period, it shall when received be treated as gross income of the relevant person for the relevant period.

[18] It is noted there is no definition of the word "perquisite" under the Act. Based on the *Black's Law Dictionary*, "perquisite" means "a privilege or benefit given in addition to one's salary or regular wages". In the present case Maxis' employees were offered to purchase Maxis' shares at a discounted price. In other words, the shares offered by the employer are lower than the market value of the shares. The offer and other matters relating to the shares are regulated by the Maxis bylaws.

[19] We are of the view in the case of ESOS, the benefit arising from the ESOS to the Maxis' employee is considered as a perquisite under the Act. By virtue of s. 25(1A) of the Act, the perquisite is taxed in the year the employee exercised the right to purchase the shares. The mechanism to tax the perquisite is in accordance with s. 32(1A) of the Act where the difference between the offer price and the lower of the market value of the shares on the date of offer is taxed as a perquisite.

[20] It is to be noted the peculiar facts of the present case is that the ECC is a cash payment in substitution of the unvested options under the ESOS. The scheme had been cancelled pursuant to a conditional take-over offer by Binariang to acquire all voting shares in Maxis for a cash consideration. We are in agreement with the contention of the Revenue that both ss. 25(1A) and 32(1A) of the Act are not applicable to determine the taxability of the payment of the ECC as argued by Maxis.

Section 25(1A) of the Act provides for taxability of gross income from an employment in respect of any right to acquire shares as follows:

> 25. (1A) The gross income from an employment in respect of any right to acquire shares in a company of the kind to which para. 13(1)(a) applies, shall where the right is exercised, assigned, released or acquired in the relevant period be treated as gross income of the relevant person for that relevant period.

[21] The application of s. 25(1A) of the Act is to be read together with s. 32(1A) of the Act which provides for the computation of the value of shares which is as follows:

> 32.(1A) (a) Where in the relevant period a relevant person acquired any right to acquire shares in a company of the kind to which para. 13(1)(a) applies, under his name or in the name of his nominee or agent, the amount in respect thereof to be included in his gross income from the employment shall be:
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> (i) The market value of the shares where the right shall be exercised, assigned, released or acquired on a specific date or where the right shall be exercised, assigned, released or acquire within a specific period, the first day of that period; or
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> (ii) The market value of the shares on the date of the exercise, assignment, release or acquisition of the right, whichever is the lower less the amount paid for the shares.
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> (b) In this subsection 'market' value means:
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> (i) In the case of a company listed on Bursa Malaysia, the average price of the shares which is ascertained by averaging the highest and the lowest price of the shares for the day; or
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> (ii) In any other case, the net asset value of the shares for the day.

[22] It is noted that s. 2 of the Act further defines "share" as follows:

> 'Share', in relation to a company, includes stock other than debenture stock.

Upon a plain reading of s. 25(1A) of the Act, the following elements must be in existence:

(a) A right to acquire shares exist;

(b) The shares must be owned by the employee/under his name;

(c) If the right to acquire the shares exist, the date when that right is exercised or released.

[23] Based on the facts of the present case the employees of Maxis were offered the right to purchase the shares on the vested date. However, before the option is exercised, Maxis has been subjected to a takeover by Binariang. Thus, there were no shares to be offered to the employee. It is also noted that the date of the grant is not the date where the employees have acquired the right over the shares. The option is only vested on the employees, one third of each anniversary and the employee must exercise the right on or after the anniversary date. This is evidenced by ESOS by laws where cl. 7.1.1 states that:

> 7.1.1 To the extent of one-third (1/3) of the shares covered thereby on each of the first three anniversaries of the date of grant, if the optionee shall have been in the continuous service of the company or any of its subsidiaries throughout such period.

[24] On the facts of the present case, it is our judgment that the payment of the ECC is not based on ESOS. This is clearly different from ESOS because for the employee to be entitled for the shares under ESOS, they must purchase the shares. The payment which is based on the "adjusted offer price less option price" is only a mechanism for making the payment but does not reflect ESOS. By a letter dated 13 February 2008, Maxis tax consultant had indeed confirmed as follows: "that Maxis was delisted from the main board of Bursa Malaysia on 13 July 2007 and hence no listed share price can be attached to the shares ...". Hence, by this admission we are in agreement with the contention of the Revenue that the cash payment is not an ESOS.

[25] We are in agreement with the contention of the Revenue that there is no ambiguity as regards to the interpretation of the words in ss. 25(1A) and 32(1A) of the Act which in its ordinary meaning means that they are applicable to employment income (perquisite) in respect of any right to acquire shares and provide the mechanism to compute the value of shares/perquisite.

[26] It is our view that the words used and the intention of parliament is clearly shown in ss. 25(1A) and 32(1A) of the Act that the provisions apply to shares and not to cash payment or the ECC. Even if the court is of the view that the words in ss. 25(1A) and 32(1A) of the Act are not clear and may include the payment of the ECC or cash payment, then the purposive approach to interpretation should be adopted. On this point in the case of *Lembaga Hasil Dalam Negeri Malaysia v. Alam Maritim Sdn Bhd* [2014] 3 CLJ 421; [2014] 1 MLRA 1 the Federal Court held at p. 8 as follows:

> In *Palm Oil Research and Development Board Malaysia & Anor v. Premium Vegetable Oils Sdn Bhd* [2004] 2 CLJ 265, Gopal Sri Ram, JCA (as he then was) had occasion to state:
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> > When construing a taxing or other statute, the sole function of the court is to discover the true intention of parliament. In that process the court is under a duty to adopt an approach that produces neither injustice nor absurdity, ie, an approach that promotes the purpose or object underlying the particular statute albeit that such purpose or object is not expressly set out therein.

Useful reference can also be made to the Finance Bill 2005 to ascertain the intention of Parliament when enacting ss. 25(1A) and 32(1A) of the Act. Paras. 2 and 3 of the explanatory statement explained as follows:

> 2. Clause 5 seeks to amend s. 25 of Act 53. New sub-ss. (1A) is introduced so that the gross income in respect of any right to acquire shares in a company is taxed in the year where the right is exercised, assigned, released or acquired.
>
> 3. Clause 6 seeks to introduce new sub-ss. (1A) into s. 32 of Act 53. The amendment seeks to provide the method to ascertain the gross income of a person from an employment in respect of any right to acquire shares in a company. The gross income shall consist of the market value of the shares at the time the right is exercisable or the market value at the time the right is exercised, whichever is the lower, less the amount paid for the shares.

[27] From the above explanatory statements on the amendment to ss. 25 and 32 of the Act, it clearly show that the intention of introducing the provisions is to clarify the tax treatment on income from employment on any right to acquire shares in a company. From the explanatory statement it is also made clear that ss. 25(1A) and 32(1A) of the Act do not apply to benefit or perquisite received by an employee by way of cash payment.

Conclusion

[28] For the reasons abovestated we would answer the questions posed in this appeal as follows:

> As regards question (i), it is our decision that the RM1 payment made by the employee merely indicates the employee acceptance of the offer. It does not give the employee the right to acquire the shares as yet. The employees were only eligible to purchase the shares on the anniversary date in order to be the rightful owner of the shares. The employee cannot maintain the offer to purchase the shares by reason of the takeover because Maxis has been delisted. There were no longer any shares to be offered. The employee does not have any right to purchase the shares before the anniversary date as the shares had yet to be vested in the employee.
>
> As regards question (ii), we would answer it in the affirmative.
>
> As regards question (iii), it is our decision that an employee who has an unvested option in ESOS has no right to acquire the shares before the anniversary date. Thus, the cash benefit received is not taxed in accordance with ss. 25(1A) and 32(1A) of the Act, but instead, is taxable under s. 25(1) of the Act.

We would accordingly dismiss this appeal with costs.